

Charles Cajetan Count Leslie, and } Appellants.
Anthony Leslie of Balquhain, }

Peter Grant, and David Orme *Writer* } Respondents.
in Edinburgh his Tutor ad Litem, }

The Appellants C A S E.

IN the Beginning of the 17th Century, *Walter Leslie*, of the antient Family of *Leslie* of *Balquhain* in *Scotland*, entered into the Imperial Service; was promoted to the Rank of a Count of the Empire, and had considerable Estates in *Germany* conferred upon him.

Upon his Death, and Extinction of his Line, the *German* Honours and Estate descended to *James Leslie*, who renounced his paternal Inheritance of *Balquhain* in favour of his younger Brother *Patrick Leslie*.

Count *James* had no Issue, his Brother *Patrick* had two Sons *James* and *George*, and two Daughters, and having a near Prospect of succeeding his Brother *James*, he, with a View to that Event, settled his *Scots* Estate by a strict Entail on himself for Life, Remainder to *George Leslie* his second Son, and the Heirs Male of his Body, Remainder to the Heirs Male procreat, or to be procreat of his own Body, of his then present or any other Marriage, and the Heirs Male to be procreat of their Bodies — Remainder to *James Leslie* his eldest Son, and to the Heirs Male of his Body; with several Remainders over, — Provided that in case it should happen the said *George Leslie* or the Heirs Male of his Body, or any other Heirs Male of his the said *Patrick's* Body, to succeed to both the said Estates, in that Case the foresaid Estate of *Balquhain* and others therein specified, should fall and belong to the next Heir Male to be procreat of his Body of that or of any other Marriage — Remainder to the subsequent Heirs of Tailzie, in the Order of Succession above mentioned, to whom, and in whose Favour the said Heirs Male, and the said Heirs of his Body, who should succeed to the said Lands and Estate in *Germany*, should be holden and obliged to dispoise and resign the foresaid Lands and Estate of *Balquhain*, and the same should from thenceforth be redeemable by the other next Heirs Male, to be procreat of his Body of that or any other Marriage, and the other Heirs of Tailzie foresaid, from the said Heirs Male who should succeed to both the said Estates, and his Heirs Male, by Payment of the Sum of Ten Merks; and [he reserved to himself a Power to alter.

1694 March 9.
Sept. 9.
Charter and In-
festment.

On this Deed there passed a Charter under the Great Seal, and Infestment was taken the 9th September, 1694.

1700. July 13.
Second Entail of
the Estate of
Balquhain.

James Count Leslie dying soon after, *Patrick* (then Count *Leslie*) made a second strict Entail of the Estate of *Balquhain*, reciting, " That he found it expedient to alter the former in some Respects, and therefore granted Procuratory for resigning the said Estate to himself in Liferent, and to his Son the said *George Leslie* and the Heirs Male of his Body — Remainders to the Heirs Male of his own Body of any other Marriage, and the Heirs Male of their Bodies — Remainder to the Appellant *Charles Count Leslie*, (the:in described second Son lawfully procreat betwixt *James Count Leslie*, Count *Patrick's* eldest Son, and *Berne Princess of Lichtenstein* his Wife) and the Heirs Male of his Body — Remainder to any other second Son procreat or to be procreat of the said *James Count Leslie* his Body, of that or any subsequent Marriage, and the Heirs Male of their Bodies — Remainder to any second Son of *Joseph Patrick Count Leslie*, eldest lawful Son to the said *James Count Leslie*, and the Heirs Male of their Bodies — Remainder to any second Son of *Francis Jacob Count Leslie*, only lawful Son to *Alexander Count Leslie*, Count *Patrick's* younger Brother, and the Heirs Male of their Bodies — Remainder to any second Son of the Body of Count *Francis*, *Jacob's* eldest Son, and the Heirs Male of their Bodies — Remainder to *James Leslie*, eldest Son of *Alexander Leslie* of *Piteaple* and of *Marjory Leslie Count Patrick's* eldest Daughter, and the Heirs Male of his Body. — Remainder to *John Grant*, eldest Son of *John Grant* of *Ballindalloch*, and of *Anna Francisca Leslie Count Patrick's* Second Daughter, and to the Heirs Male of his Body: with several Remainders over. — Proviso, That all the Heirs of Tailzie should be bound and obliged to perform, and closely adhere to, the several Conditions, Provisions, and Restrictions and Limitations contained in the former Entail, as if they were therein at full Length inserted, except one Provision as to the Heir of Tailzies residing in *Scotland*, which was dispensed with.

Remainder under which the Respondents claim.

On Count *Patrick's* Death, his second Son *George* took the Estate of *Balquhain*, and after him *James*, *George's* eldest Son, but without making up his Titles; and dying without Issue, his only surviving

1739. July 17.

surviving Brother *Ernest* was, on the 17th July, 1739, served Heir of Tailzie and Provision to their Father *George*, and duly infeft; but dying also without Issue, the Estate Tail limited to *George* and the Heirs Male of his Body was spent, and there being no Heirs Male of the Body of the Donor, of any other Marriage, the Remainder limited to the Appellant *Charles Cajetan Count Leslie* by Name took Effect in Possession.

The Appellant Count *Charles Cajetan* was in the actual Possession of the German Estate by his Father and elder Brother's Death. — And a Doubt arising, whether, by the Conditions and Limitations of the Deeds 1692, and 1700, he could hold both, three several Actions were brought in the Court of Session against him: One by his eldest Son Count *Leopold*, another by his second Son Count *Anthony*, and the third by Sir *James Leslie* of *Pitcaple*, for declaring, that he could not, under the Settlements of 1692, and 1700, hold both Estates, but must divest himself of the Estate of *Balquhain*; and the Plaintiffs in these several Actions respectively claimed to be the Person.

1741. Feb. 22.

The Court of Session, by Interlocutor dated the 11th February, 1741, "Found that the Appellant Count *Charles Cajetan*, and the Heirs Male of his Body, were obliged to denude in favour of *James Leslie* of *Pitcaple*;" but the present Appellants having severally appealed from this Interlocutor, it was, on the 29th April, 1742, "Ordered and adjudged by the Lords Spiritual and

1742. April 29.
Judgment of the House of Peers.

Temporal in Parliament assembled, That the Appeals of *Charles Cajetan Count Leslie*, and *Leopoldus Count Leslie*, be dismissed; and upon the Appeal of *Antonius Count Leslie*, it was declared, "That *Antonius Count Leslie*, second Son to *Charles Cajetan Count Leslie*, was the next Heir of Tailzie, to whom the Estate of *Balquhain*, in the Event which had happened, devolved, according to the true Intent and Meaning of the Deeds of Entail mentioned in the said Appeals: And their Lordships thereby ordered and adjudged, that the said *Charles Cajetan Count Leslie* should denude himself of the Estate of *Balquhain* in favour of the said *Antonius Count Leslie*, and that the same should be redeemable by the said *Antonius*, from the said *Charles Cajetan Count Leslie* and his eldest Son, or his Heirs Male, for Payment of the Sum of Ten Merks Scots, in Terms of the said Entail; and they farther ordered that the Lords of Session should give the necessary Directions for carrying that Judgment in Execution."

1742. Aug. 2.

The Appellant Count *Anthony* served Heir of Tailzie in the Estate of *Balquhain*. Charter and Infeftment thereon, and peaceable Possession till 1757. Respondent *Grant's* Claim. His Action of Reduction.

The Appellant Count *Anthony* being accordingly served and retoured nearest Heir of Tailzie and Provision to *Ernest Leslie*, obtained an Adjudication of the Estate of *Balquhain* against the Appellant Count *Charles Cajetan*, whereon a Charter and Infeftment followed; and from thence till 1757, when the present Action was brought, has been in quiet Possession of the Estate.

The Respondent *Peter Grant*, under the Name of eldest Son to Capt. *John Grant* late of *Ballindalloch*, the eldest Son of *John Grant* of *Ballindalloch* deceased, and of *Anna Francisca* second Daughter of *Patrick Count Leslie*, brought an Action of Reduction and Declarator in the Court of Session against the Appellants, against his own Father, and against some of the other Heirs Substitute to the Succession of the Estate of *Balquhain* by the Settlement 1700 before himself, concluding that they being all either as Aliens or Papists, by Law incapable to inherit, the tailzied Estate should be declared to belong to him as next Protestant Heir, and that the Appellant *Charles Cajetan*, ought to be decerned and ordained to obtain himself served and retoured in that Estate, and being infeft therein, to denude in his Favour. — At the same Time he took out a Brieve from his Majesty's Chancery in Scotland for serving him next Protestant Heir to *Ernest Leslie*, the Person last infeft before Count *Anthony*.

The Appellants were abroad when this Attempt was made to strip them of their antient Family Inheritance; their Agent defended them in the best Manner he could, without Instructions from his Constituents, against Objections all personal to the Appellants themselves; and the Respondents, to improve their Advantage from the Appellants Absence, hurried on both Actions with an unprecedented Rapidity.

1758. Jan. 27.

After various Proceedings, and Interlocutors on preliminary Points disputed in the Cause, the Court of Session, "upon Report of the Lord *Prestongrange*, and having heard Council for the Pursuer, and for *Antonius Count Leslie*, found, That the Pursuer has a good Title to carry on this Action; and in Regard it was admitted in the Process at the Instance of the now Defendant (Appellant) *Antonius Count Leslie* before this Court, against *James Gordon* of *Cowbardie*, in the Year 1749, that he the said *Antonius* was born in foreign Parts, outwith the Allegiance of his Majesty, in which Cause the Court found, That by the Common Law of Scotland an Alien not naturalized cannot succeed to any Heritage in this Country; and found that the said *Antonius* is an Alien, and therefore had no Right to carry on that Action for Recovery of a Land Estate; and as it is not now alledged that the said *Antonius Count Leslie*, or Count *Charles Cajetan Leslie* his Father, were born within the King's Allegiance, found it presumed, that the said *Antonius Count Leslie* is an Alien; and remit to the Lord Ordinary to proceed accordingly."

Feb. 28.

And on a reclaiming Petition for the Appellants, which was answered by the Respondents, "The Lords adhered to their former Interlocutor, with this Variation, that they find it presumed, that *Antonius Count Leslie* and Count *Charles Cajetan Leslie* his Father, were both born in foreign Parts outwith the Allegiance of his Majesty."

The Appellants Agent, though still uninstructed by his Constituents, thought himself bound to appeal from these two, and twenty three other Interlocutors made in the Respondents two Actions.

1758. April 6.
Judgment of the House of Peers.

And on hearing the Appeal, "the Lords Spiritual and Temporal in Parliament assembled, ordered, and adjudged, That the said Interlocutors of the 27th January, and 28th February 1758, complained of in the said Appeal be, and the same were thereby reversed; and it was thereby ordered that

"that both Parties be at Liberty to make such Proofs as are competent to them by Law, and that it be remitted to the Lord Ordinary to proceed accordingly."—The other Interlocutors were affirmed.

Farther Proceedings in the two Causes.
1758. Dec. 20.
Interlocutor of the whole Lords, in the Service appealed from.

The two Causes being returned to the Court of Session, and the Appellant *Anthony*, (who has the whole beneficial Interest) about this Time made acquainted with their Nature and Tendency, he returned to *Scotland*, and removed the Objection with Respect to his Religion, by taking the *Formula* prescribed by the Act of Parliament of 1700. And the Court of Session, by Interlocutor of 20th December 1758, "Upon the Report of the Lord Prestongrange, Found that the Brieve as nearest Protestant Heir presently depending before the Macers, at the Instance of Peter Leslie Grant, still subsists, notwithstanding of the Certificate produced for Anthony Leslie of Balquhain of his having taken the Formula, and repel the Objection made to the Commission issued by the Clerk to the said Service, and ordain the Seals to be taken off the Proof following upon the said Commission, to the Effect the Purchaser of the Brieve may have Access thereto."

1758. Dec. 3.
Interlocutor of the whole Lords.
1st. Interlocutor appealed from in the Action of Reduction.

And in the other Action of Reduction, the Lord Ordinary, by Interlocutor dated the 8th of December 1758, "Before Answer allowed the Pursuer to prove prout de jure, that Charles Cajetan Count Leslie, Antonius Count Leslie, and the baill other Defenders called (excepting Captain John Grant the Pursuer's Father) were born in Foreign Parts, outwith his Majesty's Allegiance; and also that the said Charles Cajetan Count Leslie, and the baill other Persons Defenders called in this Process, (excepting Antonius Count Leslie) are Papists, and profess the Romish Religion, and all other Facts and Circumstances relative thereto; and allows the Defenders a conjunct Probation thereanent, if they shall think fit; and grants Commission to both Parties for proving to the Effect foresaid; and that at Leuchtenberg, Chamb, Ratibon, Gratz, Gorlitz, Freyberg, Landshut, Schwednitz, Erfurd, Leewarden, Vienna, Venice, Hague, Rotterdam, Amsterdam, Gertrudenberg, Uleffingue, alias Flushing, Trieste, London, Dublin, Edinburgh, Aberdeen, Old Aberdeen, Mill of Pitcaple, Kinmundy, Elgin and Irvine; and that any lawful Day or Days betwixt and the Day of next to come, each Party before Extract naming Commissioners to the other for taking their Proof at the respective Places above mentioned: And in case they fail to name, or the Commissioners named failing to accept or attend, then to the Governors, Deputy Governors, or any of the Civil Judges in the several Towns in Germany, Holland, or Netherlands, where this Commission may be executed, and to any of the Councillors of the City of Venice, failing the Acceptance and Attendance of the Commissioner or Commissioners named for taking the Proof there; and to any of the Justices of his Majesty's Peace for the Cities of London and Dublin, failing the Acceptance and Attendance of the Commissioners named for taking the Proof at these Places; and to the Sheriffs Deputes or Substitutes, or any of his Majesty's Justices of the Peace for the several Shires in Scotland where the Commission may happen to be executed, failing the Acceptance and Attendance of the Commissioners named for taking the Proof in Scotland; and each Party intimating to the other, or to their Doers at Edinburgh, the Time they are to begin to lead the respective Proofs at the Places above named forth of Scotland; and that one Month at least before taking the said Proofs, and 14 Days at least before leading any Proof at the Places above named in Scotland, and recommends to the Commissioners accepting, and who shall be assisting in executing this Commission in foreign Parts, to apply for and obtain all proper and necessary legal Compulsitors for making the Witnesses compear before them, as to them shall seem expedient and necessary, to be reported the Day of next, and grants Warrant for Letters of Diligence, at either Party's Instance, against Havers and Witnesses residing in Scotland for compearing and deponing before the Commissioners to the same Day: But supersedes extracting the Commission hereby granted for taking the Proof at any of the Places abroad, and without the Dominions of Great Britain to the 7th Day of February next to come, to the End the Defenders Doers may have an Opportunity to be instructed to name proper Commissioners at these several Places abroad; betwixt and which Day, if they fail to name, allows the Commission to be extracted, without Prejudice nevertheless to the Pursuer to take an Extract of the Commission hereby granted for leading the Proof to be adduced by him within the Dominions of Great Britain, in the common and ordinary Way allowed by the Forms of Court."

Appellants Representation.

This Interlocutor manifestly tended to involve the Appellants in an immense Expence, and a Series of Operations, which appeared almost impracticable; so many, so remote, and so inconvenient Places were jumbled together, that it seemed calculated to deter the Appellant from attending the Respondent in his Enquiry; and yet, on a serious Reflection, it occurred, that all this Work and Expence might be entirely thrown away, and not answer either the Respondent's or Appellant's Purpose. However, the Appellant confined his first Representation against this Interlocutor to the Difficulties it laid him under. To fix upon Commissioners in the different Parts of the World where the Commissions were to be sped before the 7th of February, when there was scarce Time to receive an Answer, by the ordinary Course of the Post, from some of the Places mentioned in the Interlocutor, was absolutely impracticable; and several Places mentioned in the Interlocutor were the Seat of War, and in the Possession of the King of Prussia, whither the Appellants, who had Estates in the Austrian Dominions, could not repair with Safety.

The

1758. Dec. 22.
Interlocutor of
Lord Ordinary.
ad. appealed
from in the Re-
duction.

The Respondent answered the Appellant's Representation, but the Lord Ordinary would indulge no farther than by enlarging the Time for naming Commissioners a Fortnight; and pronounced the following Interlocutor on the 22d of the same Month of December. "Having considered this Representation and above Debate, prorogates the Time formerly allowed to the Defenders for naming Commissioners to take the Proof at the Places abroad, and without the Dominions of Great Britain, to the 21st of February next to come. And in order that no Dispute may remain anent the Intimations to be made by the Pursuer, of the Time he is to begin his Proof, appoints the Intimations to be made to the Defenders themselves, or to their Doers here, that is, to any of the Defenders Lawyers, Ronald Crawford, Writer to the Signet, and Allan Clark, their Agents; or that Notice be made and given to Thomas Dundas, Esq; younger, of Fingask, at the Shop of Mess. Dundas, Inglis, and Caledar, Merchants, in Edinburgh."

Reclaiming Pe-
tition for Appel-
lant.

The Appellant reclaimed against this Interlocutor by a Petition to the whole Lords, wherein he stated the same Objections he had made in his Representation to the Lord Ordinary; and farther observed, that the naming such a Number of Places for speeding the Commission could answer no Purpose, but that of perplexing and distressing the Appellant, and putting him to an extraordinary Expence, when the Respondents did not even pretend to assert, that they had Witnesses in all these several Places which they had given in, and were mentioned in the Interlocutor. He therefore prayed that the Execution of the Commission might be confined to two or three capital Towns, whither they might bring their Witnesses without Difficulty, and to which the Appellants might resort with Safety.

1759. Jan. 16.
Interlocutor of
the whole Lords.

3d.
Jan. 20.
Interlocutor of
the Lord Ord-
inary.
4th.

The Lords, by their Interlocutor of this Date, remitted the Affair to the Lord Ordinary, with Power to him to do therein as he should see Cause.

In consequence of this Remit, the Lord Ordinary pronounced the following Interlocutor. "Having considered the former Interlocutor, with this Petition and Remit, and heard the Opinion or Advice of the Lords, delivered by the Lord President, that as Parties have no legal Title or Privilege to name or choose Commissioners for taking each others Proof, in the present Case it appeared most expedient for avoiding some of the Inconveniencies alledged in the Petition, that there should be no Commissioners named by the Parties in this Cause; and having heard Parties Procurators thereon, the Lord Ordinary before Answer allows the Pursuer to prove prout de Jure, That Charles Cajetan Count Leslie, Antonius Count Leslie, and the bail other Defenders, excepting Captain John Grant, the Pursuer's Father, were born in foreign Parts, outwith his Majesty's Allegiance; and also that the said Charles Cajetan, Count Leslie, and the bail other Persons Defenders called in this Process, (excepting Antonius Count Leslie) are Papists, and profess the Romish Religion, and all other Facts and Circumstances relative thereto. And allows the Defenders a conjunct Probation thereanent, if they should think fit, and grants Commission to both Parties for proving to the effect foresaid, and that at Leuchtenberg, Chamb, Ratibon, Gratz, Gorlitz, Freyberg, Landshut, Schwednitz, Erfurd, Leewarden, Vienna, Venice, Trieste, Hague, Rotterdam, Amsterdam, Gertrudenberg, Uleslingue, alias Flushing, London, Dublin, Edinburgh, Aberdeen, Old Aberdeen, Mill of Pitcaple, Kirmundy, Elgin, and Irvine; and that any lawful Day or Days, betwixt and the 24th Day of June next to come, the Governors, Deputy-Governors, or any one of the Magistrates, or Civil Judges, in the several Towns or Places beyond Sea, respectively above named, where this Commission may be executed, to be Commissioners for taking the said Proofs; which Governors or Judges, who shall be applied to by, or on behalf of either of the Parties in this Cause, are hereby requested to accept of and execute this Commission ex Comitatu, and for the Furtherance of Justice; and to any one of the Justices of his Majesty's Peace for the Cities of London and Dublin, for taking the Proof at these Places; and to the Sheriff's Deputes or Substitutes, or any of his Majesty's Justices of Peace, for the several Shires in Scotland, where the Commission may happen to be executed; each Part intimating to the other, or to their Doers at Edinburgh, the Time they are to begin to lead their respective Proofs at the Places above named forth of Scotland; and that six Weeks at least before taking the said Proofs, and fourteen Days at least before leading any Proof at the Places above named in Scotland; and recommends to the Commissioners accepting, and who shall be assisting in executing this Commission in foreign Parts, to grant, or apply for, and obtain, all proper and necessary legal Compulsitors for making the Witnesses compare before them, as to them shall seem expedient and necessary, to be reported the said 24th Day of June next to come; and grants Warrant for Letters of incident Diligence, at either Parties instance, against Havers and Witnesses residing in Scotland, for comparing and deponing before the Commissioners to the same Day; but supercedes extracting the Commission hereby granted for taking the Proof at any of the Places abroad, and without the Dominions of Great Britain, to the 7th Day of February next; without Prejudice, nevertheless, to the Pursuer to take an Extract of the Commission hereby granted for leading the Proof to be adduced by him within the Dominions of Great Britain, in the common and ordinary Way allowed by the Forms of Court."

Representation
for the Appel-
lants.

The Appellants preferred a Representation to the Lord Ordinary against this Interlocutor also, pointing out the Impropriety, and Inconveniency attending it: The Impropriety, for as much as the naming Commissioners by both Parties having been established by two succeeding Interlocutors, and not complained of by either Party, the Lord Ordinary was not authorized to vary from it, by delegating the Power of examining under the Commission to every Magistrate, however obscure and inconsiderable, in every Town pointed out by the Respondent, and mentioned in the Interlocutor: And as to the Inconveniencies, the Appellant insisted, that it would

[5]

would be to little Purpose to give the Appellant's Agents at *Edinburgh* thirty Days Notice of the speeding of a Commission, e. g. at *Vienna* or *Amsterdam*, when it was very possible that the Respondent might carry on an Examination in either of these Places before some obscure Magistrate, without the Knowledge or Privity of the Appellant's Agent, although he might be at the same Time in the same Town, in consequence of the Notice given at *Edinburgh*. But as the Appellant found, that all his Observations tending to shew how impracticable the Commission, as directed by this Interlocutor, really was, were but ill received, he proceeded by his Representation to shew, that the Commission must in the End be ineffectual, or at least that it was premature; and that another very material Question was to be determined, before they proceeded farther in the Commission: He therefore insisted, that although it should be made evident that both Count *Charles Cajetan* and Count *Antonius Leslie* were Aliens, the Respondent would not thereby establish a Right in himself; for that Count *Charles Cajetan*, even supposing him an Alien, yet by the express Limitation of the Estate to him by Name in the Settlement of the Year 1700, took an Estate by Purchase, and although by the Laws of *England* (which in regard to real Estates confine the Right of Aliens to narrower Bounds than the Laws of other Countries do) an Alien cannot hold an Estate, yet it is universally admitted that he may take an Estate, and the Benefit thereof accrues to the Crown by its Prerogative. — It was equally evident that Count *Antonius* took his Estate by Purchase, as he was to take by a Disposition or Conveyance made by Count *Charles Cajetan*, pursuant to the Directions of the Settlement of the Year 1700, or by an Adjudication which was tantamount thereunto, and thence it would necessarily follow, that if he should be deemed an Alien, he took the Estate for the Benefit of the Crown: And that Count *Antonius* took by Purchase would not be contradicted by the Respondent, as the Manner in which the Respondent prays to be admitted on the supposed Irritancy or Incapacity of Count *Antonius* is plainly such as must be construed a taking by Purchase; for his Prayer is, "That *Charles Cajetan Count Leslie* should be decerned and ordained to grant, subscribe, and deliver a valid and sufficient Disposition, containing Procuratory of Resignation, and all other necessary Clauses of the said Land and Estate of *Balquhain*, to and in favour of the said *Peter Grant*, and the Heirs Male of his Body, &c." On the other Hand, should the Respondent fail in his Proofs, or should the Proofs of the Appellants Side prevail, yet the Evidence taken in this Cause would avail the Appellant nothing, should the Crown think fit, immediately after, to institute a Suit, or proceed to an Inquisition against the Appellant as an Alien, in order to come at this Estate. As the Case was thus circumstanced, and the Commission was to be attended with so great Trouble and Expence, the Appellant prayed that this Point might be first determined before the Commission issued.

1759. Feb. 16.
Interlocutor of
Lord Ordinary.
5th.

"The Lord Ordinary having advised this Representation, with the Answers thereto, and what is above set forth in the Minute of Debate, Finds that the Pursuer before leading his Proof at any of the Places abroad, and without the Dominions of Great Britain, where Proof is appointed to be taken by the former Interlocutors, shall be obliged to make Intimation to the Defenders, or their Doers, of the Names of the Governors, Judges, or Magistrates, in each of these Places before whom the Proof is to be taken, and of the House or Place in each of these Towns or Cities respective where such Proof is to be taken, by leaving in the general Posthouse of each of these Towns or Cities, a Letter directed to the Defenders *Charles Cajetan Count Leslie*, *Leopoldus Count Leslie*, *Antonius Count Leslie*, or either of them, or their Agents or Doers, containing the Name of the Governor, Judge or Magistrate before whom the Proof is to be taken, and the House or Place in the said Town or City, where the said Proof is to be taken, and which Letter is to be put in the General Post-Office of each of the Towns or Cities respective where Proof is to be taken, Forty-eight Hours at least before leading any Proof at these Places respective; and refuses the Desire of the Representation as to the baill other Points thereof in respect of the Answers, and adheres to his former Interlocutors."

Verbal Declaration
of Lord Ordinary.

Though this last Interlocutor refuses, in general Terms, the Desire of the Appellants Representation, yet the Lord Ordinary was pleased verbally to signify his understanding thereof to be, that the Points therein stated would be entire when the Proof should come to be advised.

Reclaiming Petition
of Appellants.

As this general Refusal of the Desire of the Appellants Representation might, notwithstanding the verbal Declaration of the Lord Ordinary, be considered as conclusive on the Appellant, if not objected to, and as the Question stated by the Appellant might be soon determined, and the Determination thereof did no way depend on the Proofs intended to be deduced, it seemed extremely severe to put the Parties to the extraordinary Expence which must necessarily attend the Execution of the Commission, when it was manifest, that if the Point, which, according to the Lord Ordinary's Expression, was left entire, should afterwards be determined against the Respondent, the whole Proceedings upon the Commission would be of no Weight; therefore the Appellant presented a reclaiming Petition to the whole Lords, insisting on the same Matter he had done by his Representation to the Lord Ordinary, and further shewing, that by the Laws of *Scotland*, even in the Case of a Descent of Lands on an Alien, the Right vested in the Crown by Escheat; and praying their Lordships to find that the Right, if any be, from the Appellant's supposed Alienage, belongs to the Crown, and therefore that the Crown ought at least to be made Party to the Suit; and in the mean time until this Question should receive

receive their Lordships Judgment, to stop extracting the Act and Commission awarded by the Lord Ordinary for taking the Proofs in so many Parts, both Foreign and Domestick.

1759. March 8.
Interlocutor of
the whole Lords. 6th.

The Respondents having answered this Petition, the Court of Session, by Interlocutor of this Date, refused the Desire of the Petition, and allowed the Act to be extracted."

The Appellants, apprehending themselves to be aggrieved by the said several Interlocutors of the 8th, 20th, and 22d of December 1758, 16th and 20th January, 16th February, and 8th March 1759, have appealed therefrom, and humbly hope they will be reversed or varied, for the following among other

R E A S O N S.

- I. It is an established Rule in all Laws, as well as in common Sense, that a Plaintiff suing for an Estate in the Possession of another Person, must shew a Title in himself, in Case the Right of the Possessor was out of the Way. If he fails in this, he is stopt *in limine*, since a Plaintiff's saying, *you have no Title, ergo I have*, is a *non sequitur*, and the letting him into a Proof of Facts and Circumstances would be but unnecessarily vexing the Defendant in a Question where the Plaintiff has no Interest. The Appellants therefore having stated an Objection to the Respondent's Right of carrying on this Action, the Court ought in the first Place to have determined that Objection before they allowed a Proof. And it is not sufficient that the Objection is reserved open till the Proof shall be reported, since in the mean Time they are at a great Expence, dragged all over *Europe* to attend a Proof taken by a Person, who, whether his Averments be true or false, may not in the Event have any Interest.
- II. Was the Appellant at Liberty to go into the Merits of the Question, whether upon the pretended Incapacity of Count *Charles Cajetan* and Count *Antonius Leslie* as Aliens to hold the Estate, the Crown did not become interested, he would have pleaded, that by the Laws of *Scotland*, the Title of the Crown by *Escheat* would be established whether they were supposed to take by Descent or by Purchase. But even by the Laws of *England*, if Count *Charles Cajetan* or Count *Antonius* took by Purchase, the Crown would be intitled to the Estate by Prerogative; and from what has been offered to the Court, it is plain that Count *Charles Cajetan* and Count *Antonius* took by Purchase; but as the Court made no Determination on the Question, but left it, as was said, entire until the Return of the Commission, they shewed that the Question was of such a Nature, as must at some time be discussed and determined. It were therefore unreasonable to postpone the Determination thereof until the Return of the Commission, since it was possible that the Determination of that Question might render the whole Proceedings on the Commission useless both to the Respondent and to the Appellant: Whereas in the present Shape, should the Respondent fail in his Proof, the Appellant may still have all this Expence to undergo a second Time against a Claim of the Crown, (should such be set up) to whom these Proceedings are not conclusive.
- III. Even though the Respondent had a Right to pursue this Action, still the Commission allowing him a Proof ought to have been confined to reasonable and necessary Places, and not given at large almost over all *Europe*, which can only tend to perplex and distress the Appellants. The Notice directed to be given to the Appellants Agents is not sufficient, and may be easily evaded. The Appellants, as the Commission now stands, can know nothing of the Witnesses 'till they appear before the Commissioners, and only then, from their own Accounts, without any Opportunity of discrediting their Evidence. In a Case like this, where a Proof is allowed to be taken in so many different Kingdoms, and the Witnesses are all of the Plaintiff's collecting, it is unjust to deprive the Defendants of the common Privilege given to every Party of naming a Commissioner for taking the Evidence of the other Party.
- Obj. The Question lately started by the Appellant as to the Right of the Crown, might have been made in the Beginning of the Cause; and as he did not then make it, he is not to be allowed to make it at this Time.

Answer.

[7]

Answer. The Appellant never did nor does he now admit himself to be liable to any of the Disabilities or Incapacities objected by the Respondent. The Appellant relied entirely on his own Right, and whilst the Respondent proceeded in the ordinary Course of Business, though vexatious and expensive to the Appellant, yet the Appellant did not think it necessary to see minutely into the Respondent's Pretensions, being conscious of the Justice of his own. But when he found that the Respondent seemed determined to involve him in immense Trouble and Expence, and in some Degree to teize the Appellant out of his Estate, it then became necessary to look more narrowly into the Respondent's Right, and strictly examine its Extent, before he submitted to follow the Respondent in his extravagant Rambles.

RO. DUNDAS.

AL. FORRESTER.

Charles Cajetan Count Leslie,
and Anthony Leslie of Bal- } Appellants.
gubain, - - -

Peter Grant and David Orme, }
Writer in Edinburgh, his } Respondents.
Tutor ad litem.

The Appellants C A S E.

To be heard at the Bar of the House of Lords on
Wednesday the 16th Day of May 1759.

AL. FORRESTER.
RO. DUNDAS.